IN THE COURT OF APPEAL AT NYERI
Criminal Appeal 120 of 2006

MOSES NDWIGA NJAGI ……..……APPELLANT

AND

REPUBLIC …….RESPONDENT

(*Appeal from a conviction and sentence of the High Court of Kenya at Meru (Sitati, J) dated 30th March, 2006* In H.C. Cr. C. No. 7 of 2000)

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JUDGMENT OF THE COURT

Although the appeal before us was fully argued on both sides, we shall not, for reasons which will become apparent shortly, analyze the evidence and submissions of counsel in any detail.

The appeal arose from the judgment of the superior court (Sitati, J) sitting in Meru in which she sentenced the appellant to suffer death after convicting him for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. It had been alleged in the information filed by the Attorney General on 10th March, 2000 that the appellant had on the night of 3rd and 4th November, 1998 at Keria Sub Location in Meru Central District, murdered **George Mbaabu Naivasha**. As the law required at the time, committal proceedings were carried out before Nkubu Senior Resident Magistrate's Court before whom a charge sheet was presented on 16th November, 1998 and a committal order for trial in the High Court was made on 27th April, 2000.

The trial opened before the superior court on 26th May, 2000 when the plea was taken and an order was made for hearing on 30th November, 2000. A further order was made that: "*the D/R (deputy Registrar) to summons (sic) assessors.*"

The hearing did not take off on that day and there is no record of selection or appointment of assessors or their names. What is apparent is that an order was made for payment of allowances to assessors. A similar order was made on the succeeding seven adjourned hearings up to 28th September, 2004. On 4th October, 2004 when the prosecution opened its case and called the first witness, one of the three assessors was recorded to be absent and was substituted with another. His name was **Isaac Gituma Mukunga** but the names of the other two were not recorded.

In the presence of three Assessors, the trial proceeded on 4th October, 2004, upto the close of the prosecution case on 8th June, 2005 with some adjournments in between. The defence case was scheduled for hearing on 5th October, 2005 but only two assessors were present, namely: **Jackson Muthee** and **Isaac Gituma**. An order was however made, in view of the age of the case, the stage of hearing and the "*provisions of the law*" that the hearing would proceed, the absence of the third assessor notwithstanding. The appellant testified and was cross-examined at length before an order was made adjourning the matter

for submissions of counsel on 6th December, 2005. On that day, the third assessor, **Francis Mbaya** made appearance and participated in the trial. All three also participated in the summing up made by the learned Judge on 7th February, 2006. On 14th February, 2006, the three assessors were supposed to return their opinions but it is recorded that the "Assessors verdict" was delivered by one "**Jackson M'Rukaria**" who stated:-

"***our verdict is that the accused is guilty as charged."***

In her judgment, the learned Judge stated in the end:-

"***the assessors who sat with me during the trial also reached a similar unanimous verdict that the accused was guilty as charged."***

We have gone into some length in examining the record because the manner of trials in the High Court is a statutory one and it is the responsibility of trial courts to ensure that the statutory requirements are complied with in such trials. ***Sections 262*** and ***263*** of the Criminal Procedure Code (the Code) provide as follows:-

"***262. All trials before the High Court shall be with the aid of assessors.***

263. When the trial is to be held with the aid of assessors, the number of assessors shall be three."

Sections 297 and **298** of the same Code further provide:-

"***297. When a trial is to be held with the aid of assessors, the court shall select three from the list of those summoned to serve as assessors at the sessions.***

298 (1) If, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors.

(2) If two or more of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors."

As is apparent from the record as examined above, there was no list of assessors submitted to the court for selection of assessors as provided for in ***section 297***. In our view, the list need not necessarily contain more than three assessors, though it would be desirable that they are more in the event that some were unqualified. But there ought to be a selection as required under the Section. If only three were invited and selected on the criteria appearing in ***sections 265***, and ***266*** of the code, that would still, in our view, be compliance with ***section 297***. At no time however was there any selection of assessors in this matter although in the end there were three assessors at the commencement of the trial. If this was the only transgression of the statutory provisions, we would have applied the test in ***section 382*** of the code, particularly when there were no objections raised by the appellant or his counsel either before the trial court or on first appeal. But the problem was compounded by other flaws and the trial was not completed with the aid of all three assessors. Along the way one disappeared only to reappear and participate in the trial at a later stage. This, as we have held before, is not acceptable. In **Maurice Otieno Ogola vs. R**, Cr. Appeal No. 240/06 decided in Kisumu a 23rd March, 2007, we stated:-

"***In the case of Dickson Mwaniki M'obici and another vs. Republic, Criminal Appeal No. 78 of 2006, (ur) this Court stated the law as follows:***

"***We stated the law on trials with the aid of assessors at the beginning of this judgment. It is evident that the trial proceeded without one assessor at some stage and there was no reason given as required under section 298 of the Criminal Procedure Code. The appellant was entitled to have the entire evidence tendered by the prosecution, as well as their own evidence, heard and evaluated by three***

assessors. That there were only two assessors when the appellant testified and no reasons were given for the absence of the third assessor was a fundamental departure from that procedure and therefore an infringement of that right. The third assessor returned to hear the summing up and to give his opinion in the trial but that was of no consequence. The death blow had been inflicted on the trial as a whole. The predecessor of this Court considered the effect of such anomaly in Cherere Gikuli vs. R., (1954) 21 EACA 304 and held:-

"***(1) A trial which has begun with the prescribed number of assessors and continues with less than that number is unlawful unless the case can be brought precisely within section 294 of the Criminal Procedure Code (ubi supra).***

(2) To be within section 294 aforesaid, one of the two conditions must be satisfied, viz, either that the absent assessor is "for any sufficient cause prevented from attending throughout the trial" or that he absents himself and it is not practicable immediately to enforce his attendance. (Muthemba s/o Ngonchi vs. R. dupra distinguished.")

The same Court also stated that where an assessor who has not heard all the evidence is allowed to give an opinion on the case the trial is a nullity – see Joseph Kabui vs. R. (1954) 21 EACA 260 and Bwenge vs. Uganda (1999) 1 EA 25"

The facts in the **Dickson M'Obici** Case (supra) and the **Maurice Ogola** Case (supra) are on all fours with the facts in the matter before us. The third assessor who dropped out midstream in the trial ought not to have been allowed to return and take part in the trial. He rendered it a nullity. At the end of the trial, only one assessor purported to deliver the "verdict" of the others who did not speak. In the first place, it is not clear whether that assessor "**Jackson M'Rukaria**," was one and the same person as "**Jackson Muthee**" who was recorded earlier as an assessor, but we will presume that he was. In the second place, there is no procedure in our laws for assessors to deliver a single or unanimous "verdict" through one of them. That would be the role of a "Jury" which system does not apply in this country. ***Section 322 (2)*** of the Criminal Procedure Code provides:-

"***322(1)***

When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record that opinion. (underlining is ours)"

The correct procedure under the section was set by this court in **Mwangi vs. Republic [1983] KLR 522** at pg. 537, thus:-

"***It is clear from the language of the section that the law requires each assessor to state his own opinion personally and the trial judge to record it. As the learned Judge had correctly directed the assessors of the requirement to give individual opinions, he should have insisted on this when the other two told him that they had selected the third assessor to speak on their behalf and, if necessary, should have allowed them to retire again to enable them to form individual verdict. The High Court ought, in a trial with the aid of assessors, not to accept a representative opinion by one of the assessors, even if such an opinion is agreed to by the other two assessors by way of mere confirmation."***

In the case before us, the other two assessors were not asked to state whether they agreed with the verdict expressed by the assessor who spoke. Once again that was a transgression of the law and, if it was the only flaw in the trial, the court would have to determine whether there was a miscarriage of justice occasioned and whether the irregularity was curable under ***section 382*** of the Code.

In all those circumstances of this case, the trial must be declared a nullity. We are, of course, aware that the system of trials with the aid of assessors has lately come under serious attack and there is indeed a Bill pending in Parliament proposing its repeal. When this Court pointed out the flaws to Mr. Orinda, his reaction was understandably dismissive. In his view, the system was only useful during the colonial

era when foreign administrators and judicial officers required the assistance of assessors to understand local customs and practices. Such flaws as there were in the trial should therefore be ignored in this day and age when the opinions of the assessors do not even bind the court. Mr. Njuguna's view, on the other hand was that the proceedings were defective only from the point when the third assessor returned after the order was made to proceed with two assessors. In his view, there should be no retrial since the case took about eight years to be finalized in the superior court.

We appreciate the sentiments expressed by both counsel but we think, with respect, that our duty is to administer justice in accordance with the law, and the law relating to trials with the aid of assessors, as far as we can ascertain, has not changed.

Should we order a retrial?

The relevant principles to consider have been stated severally by this Court. In **Muiruri vs. Republic [2003] KLR 552**, the Court held:-

"***3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.***

4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

It was also held in **Mwangi vs. Republic** (Supra):-

"***A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."***

The matter before us, as correctly observed by Mr. Njuguna, has taken fairly long to be concluded in the superior court on 30th March, 2006. That was about one year ago. It however involves a serious charge where the life of another human being was lost. The state has not made any indication that it would not be possible to obtain the witnesses who testified in the case. We have also looked at the evidence on record and in our view, it might , and we put it no further, support the conviction of the appellant. In all the circumstances, it is in the interests of justice that we over a retrial of the case.

In the result, the appeal is allowed, the conviction is quashed, and the sentence of death is set aside. The appellant shall be retried by another Judge of competent jurisdiction without delay. In the meantime the appellant shall be remanded in custody pending the retrial. Those are our orders.

Dated and delivered at Nyeri this 11th day of May, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.